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Supreme Court, U.S.
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In The
Supreme Court of The United States
October Term 1998

ROBERT LEE BACOTE,
Petitioner,

v.

THE STATE OF SOUTH CAROLINA,
Respondent.

On Writ Of Certiorari
To The Supreme Court of
South Carolina

PETITION FOR WRIT OF CERTIORARI

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48 pp

QUESTION PRESENTED

Whether The State, In A Prosecution For Driving Under The Influence Is Estopped From Presenting Evidence Of And/Or Re-Litigating A Defendant's Refusal To Submit To A Chemical Breath Test When The Defendant's Administrative Driver's License Suspension Has Been Reversed Through The Administrative Appeals Process?

List Of Parties To The Proceeding In the Court Below:

The parties in the Proceedings in the Court below are Appellant/Petitioner Robert Lee Bacoteeves and Appellee-Assistant Solicitor Brent Alan Gray, of Moncks Corner for The State of South Carolina.

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Robert Lee Bacote, respectfully prays a Writ of Certiorari issue to review the judgment of the South Carolina Supreme Court entered on June 1, 1998, and on the subsequent September 10, 1998, denial of his Petition for Rehearing.

OPINIONS BELOW

The General Sessions Court of the Ninth Judicial Circuit, Charleston, South Carolina granted the Petitioner's Motion to Suppress the State's evidence of the Petitioner's refusal to submit to a chemical breath test. The Trial Court entered a written order. (App.1-2). The State took an immediate appeal. The South Carolina Court of Appeals issued an unpublished opinion on February 6, 1997, reversing the Trial Judge and concluding the State was able to present evidence of the Petitioner's refusal. (App.4). The Petitioner filed a Petition for Rehearing which was denied on March 19, 1997. (App.11). The Petitioner's later Petition for Writ of Certiorari to the South Carolina Supreme Court was granted on December 5, 1997. (App.13). On June 1, 1998, the South

Carolina Supreme Court affirmed the Court of Appeals (App.14) and, on September 10, 1998, denied the Petitioner a rehearing. (App.22).

JURISDICTION

Judgment of the South Carolina Supreme Court was entered on June 1, 1998, and the rehearing petition was denied on September 10, 1998. This Court's jurisdiction to consider this petition from the final judgment or decree by the highest court of the state in which the decision could be had is invoked pursuant to 28 U.S.C. Section 1257(a).

STATUTORY PROVISIONS

(a) S.C. Code Ann. § 56-5-2950(a) (West Group 1997):

> A person who operates a motor vehicle in this State is considered to have given consent to chemical tests of his breath, blood, or urine for the purpose of determining the presence of alcohol or drugs if arrested for an offense arising out of acts alleged to have been committed while the person was operating a motor vehicle while under the influence of alcohol . . . .

(b) S.C. Code Ann. § 56-5-2950(d) (West Group 1997):

> If a person under arrest refuses, upon the request of a law enforcement officer, to submit to chemical tests . . ., none may be given, but the department, on the basis of a[n] [officer's] report . . . the arrested person was operating a motor vehicle . . . while under the influence of alcohol . . . the person had refused to submit to the tests shall suspend his license . . . for a period of [90] days . . . .

(c) S.C. Code Ann. § 56-5-2950(e) (West Group 1997)

> Upon suspending the license . . ., the department shall notify immediately the person in writing and, upon his request, shall afford him an opportunity for a hearing in accordance with the State Administrative Procedures Act, except . . . the scope of the hearing for the purposes of this section must be limited to the issues of whether the person was placed under arrest, whether the person had been informed . . . he did not have to take the test but . . . his privilege to drive would be suspended or denied if he refused to submit to

the test, and whether he refused to submit to the test upon request of the officer. The department shall order . . . the suspension or determination . . . there should be a denial of issuance either be rescinded or sustained.

STATEMENT OF THE CASE

a. The Pre-Arrest Activities

On June 26, 1994, Petitioner Bacote was driving his Lincoln on Murray Boulevard in Hanahan, South Carolina. He had just left the area of the Broadmore Apartments when an unidentified person apparently contacted the Hanahan Police Department and requested that law enforcement monitor Mr. Bacote's movements, because he was possibly intoxicated. A Hanahan police officer was dispatched to the area and, thereafter, began following Petitioner Bacote while he was driving on Murray Boulevard. The Officer followed Petitioner Bacote and, after allegedly observing him twice cross the roadway center line, stopped Petitioner Bacote for suspicion of DUI. The Officer admitted, however, that while there was on-coming traffic in the area, Petitioner Bacote did not cause an accident nor did he run off of the road.

b. The Interrogation

After effecting the traffic stop, the Officer detained Petitioner Bacote on the roadside. The Officer freely admitted, when he detained Petitioner Bacote, he (the Officer) was most assuredly (a) investigating Petitioner Bacote's suspected criminal activity, (b) Petitioner Bacote was under his official police authority, and (c) Petitioner Bacote would not have been able to leave the scene of the traffic stop if he had attempted to do so. In addition, the Officer admitted he did not advise Petitioner Bacote of his constitutional rights against self-incrimination either before or after he arrested

Petitioner Bacote.

Notwithstanding this constitutional infirmity, the Officer administered three (3) field sobriety tests to Petitioner Bacote -- namely reciting the ABCs, the single-leg balance (right and left legs), and the ten-step heel to toe walk. The Officer stated he had sufficient probable cause to arrest Petitioner Bacote for DUI after the second field sobriety test, but gave him the third test because he "always g[a]ve three tests."

Unabashedly, the Officer also admitted he intended to use, at a later criminal trial, whatever statements, movements, and other information he obtained from Petitioner Bacote during the traffic stop, even though there had been no Miranda warnings.

c. The BA Test And Refusal

After Petitioner Bacote allegedly failed the field sobriety tests, the Officer arrested him for DUI. Petitioner Bacote was transported to the Charleston County Detention Center for administration of a chemical breath test. Petitioner Bacote refused to submit to the chemical breath test.

d. The Administrative Finding

Prior to the "trial" Petitioner Bacote requested the South Carolina Department of Public Safety to conduct a hearing to review his test refusal. As a result of this request, Petitioner Bacote appeared before a hearing officer for an administrative hearing. Due to other trial conflicts, the administrative hearing was twice cancelled and rescheduled. The Officer appeared at the first two cancelled hearings, but

did not appear for the re-scheduled hearing. The chemical breath test operator appeared at each of the hearings. Prior to each scheduled hearing the SCDPS sent out a notification letter regarding the date of the administrative hearing. Copies of this correspondence were sent to the Officer's department.

On December 12, 1994, the third occasion, the SCDPS conducted a hearing and the hearing officer "recommend[ed] . . . the suspension of [Petitioner Bacote's] driver's license . . . for refusing to submit to a chemical test of his breath be rescinded." This recommendation was approved by the administrative hearings supervisor.

e. Trial Judge's Evidentiary Ruling

During a pre-trial discussions, the State said it was going to introduce evidence of Petitioner Bacote's test refusal. The Trial Judge then announced he would take up the admissibility of Petitioner Bacote's test refusal. While no pre-trail motion had been made, the Trial Judge required Petitioner Bacote to so move before the jury was sworn.[1] After hearing from the Officer, the Trial Judge determined the refusal "evidence [had to] be suppressed due to the administrative dismissal [of Petitioner Bacote's driver's license suspension for refusing to take the test]." The Trial Judge further stated, since neither the Supreme Court nor the South Carolina Court of Appeals had ruled on this issue, he

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[1]This took place after the jury was selected, but prior to being sworn. The Trial Judge had, however, excused them from the courtroom.

would look to "other [similar] rulings in the [C]ircuit [C]ourt" such as the decision of the Honorable Walter J. Bristow, rendered on March 25, 1993, in State v. Andrew M. Smith.

In Smith, Judge Bristow

> remanded a DUI conviction for a new trial, finding . . . it was reversible [sic] error for a trial judge to allow the State to present proof of a statutory element o[f] a criminal case, as to the Defendant's refusal to take a breathalyzer test, when the State had failed to satisfy the [statutory] elements [in] the administrative hearing, involving the same parties . . . .

The State indicated it was going to immediately appeal and then declined to move forward with its case against Petitioner Bacote. This appeal followed.

REASONS FOR GRANTING THE WRIT

REVERSAL OF AN ADMINISTRATIVE DRIVERS' LICENSE SUSPENSION COLLATERALLY ESTOPPES THE STATE FROM RELITIGATING THE "BA REFUSAL" DURING A LATER DUI CRIMINAL PROSECUTION

While the operator of a motor vehicle in South Carolina impliedly grants his consent to submit to a chemical breath test if he has been arrested for DUI, S.C. Code Ann. § 56-5-2950(a) (West Group Supp. 1997); City of Columbia v. Moore, 318 S.C. 292, 296, 457 S.E.2d 346, 348 (Ct.App. 1995); the law does not require such an individual to actually take the test. S.C. Code Ann. § 56-5-2950(d) (West Group Supp. 1997). Nevertheless, such a refusal results in an automatic administrative suspension of his driver's license. S.C. Code Ann. § 56-5-2950(d). An "implied consent" suspension remains effective regardless of the outcome of any DUI criminal prosecution.

A driver whose license has been automatically suspended may request the SCDPS to conduct an administrative review hearing to address whether the suspension was legally imposed. S.C. Code Ann. § 56-5-2950(e) (West Group Supp. 1997). The administrative hearing process either rescinds or affirms the suspension. S.C. Code Ann. § 56-5-2950(e).

Petitioner Bacote refused to take the test and his driver's license was administratively suspended. He requested an administrative hearing and the "the suspension . . . [was] rescinded." During the DUI trial, the State sought to present evidence of the refusal despite the prior SCDPS administrative dismissal. Petitioner Bacote successfully moved to suppress.

A. *Implied Consent For Chemical Breath Test Submission*

It cannot be disputed an operator of a motor vehicle in South Carolina impliedly grants his consent to submit to a chemical breath test if he has been arrested for DUI. S.C. Code Ann. § 56-5-2950(a) (West Group Supp. 1996); City of Columbia v. Moore, 318 S.C. 292, 296, 457 S.E.2d 346, 348 (Ct.App. 1995). Nevertheless, the law does not require such an individual to actually take the BA test, S.C. Code Ann. § 56-5-2950(d) (West Group Supp. 1997), but such a chemical breath test refusal will result in the SCDPS automatically administratively suspending the operator's driver's license for 90 days. S.C. Code Ann. § 56-5-2950(d).[2]

A driver whose license has been automatically suspended may request the SCDPS to conduct an administrative review hearing to address whether the suspension was legally imposed. Bacote, ___ S.C. ___, ___ S.E.2d ___ (1998) (1998 WL 282851 *2) (citing S.C. Code

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[2]An "implied consent" suspension remains effective regardless of the outcome of any DUI criminal prosecution.

Ann. § 56-5-2950(e) (Law. Co-op. 1991)). The SCDPS administrative hearing process either rescinds or affirms the suspension. S.C. Code Ann. § 56-5-2950(e).

Petitioner Bacote refused to take a chemical breath test and his driver's license was administratively suspended. He requested an administrative hearing and ultimately the "the [administrative] suspension . . . [was] rescinded." During the DUI trial, the State wanted to present evidence of the refusal despite the prior administrative dismissal. Petitioner Bacote successfully moved to suppress.

The South Carolina Supreme Court determined *collateral estoppel* did not apply to a SCDPS administrative hearing under S.C. Code Ann. § 56-5-2950(e). See Bacote, ___ S.C. ___, ___, ___ S.E.2d ___, ___ (1998 WL 282851 * 4-5). The Supreme Court affirmed the Court of Appeals' reversal of the Trial Judge and permitted introduction of the evidence.

B. *Doctrine Of Collateral Estoppel Applicable To A SCDPS Administrative Suspension Hearing*

The Supreme Court stated "[u]nder the doctrine of *collateral estoppel*, when an issue of fact or law is actually litigated and determined by a valid and final judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or different claim." Carmen v. South Carolina Alcoholic Beverage Control Commission,

317 S.C. 1, 7, 451 S.E.2d 383, 386 (1994) (Emphasis added). Moreover, the doctrine of *collateral estoppel* applies in situations where "an administrative agency is acting in a judicial capacity . . . ." Carmen, 317 S.C. 1, 7, 451 S.E.2d 383, 386.

In Bacote, the Supreme Court noted, in addition to the above, South Carolina *collateral estoppel* law also involved portions of the *Restatement (Second) of Judgments*. In South Carolina Property and Casualty Guaranty Association v. Wal-Mart Stores, Inc., 304 S.C. 210, 403 S.E.2d 625 (1991), the Supreme Court adopted Section 28 of the *Restatement (Second) of Judgments* (1982) which "provid[ed], in pertinent part:

> [Under some circumstances], relitigation of the issue in a subsequent action between the parties is not precluded [when]:
>
> * * *
>
> (3) A new determination of the issue is warranted by differences in the quality or extensiveness of the procedures followed in the two courts or by factors relating to the allocation of jurisdiction between them . . . .
>
> * * *

(4) There is a clear and convincing need for a new determination of the issue (a) because of the potential adverse impact of the determination on the public interest or the interests of persons not themselves parties in the initial action, (b) because it was not sufficiently foreseeable at the time of the initial action that issue would arise in the context of a subsequent action, or (c) because the party sought to be precluded, as a result of the conduct of the adversary or other special circumstances, did not have an adequate opportunity or incentive to obtain a full and fair adjudication in the initial action."

Bacote, ___ S.C. ___, ___, ___S.E.2d ___, ___ (1998 WL 282851 *5-6) (quoting *Restatement (Second) of Judgments*, § 28). Under the Section 28 rationale, the Supreme Court determined "the summary nature of a typical license revocation hearing makes determinations from such a hearing inappropriate for the application of *collateral estoppel*." Bacote, ___ S.C. ___, ___, ___S.E.2d ___, ___ (1998 WL 282851 *6) (citing People v. Moore, 138 Ill.2d 162, 561 N.E.2d 648 (1990)).

While this "summary nature" may be true for some of the SCDPS hearings, it clearly is not a universal position as demonstrated by this very case. The Supreme Court should have permitted the application of *collateral estoppel* on a

case-by-case basis depending on the involved nature of the particular SCDPS hearing and, in addition, especially if the suspended driver is able to reverse the suspension. Such *collateral estoppel* effect is particularly important when a DUI defendant succeeds at the administrative level in having the suspension overturned since, without *collateral estoppel*, the State is still permitted to use this evidence of a driver's "refusal" even though the suspension was improperly applied. Currently, the State has the "best of both worlds" since, regardless of the SCDPS hearing outcome, the State still has the "refusal" as ammunition in the DUI prosecution regardless of the validity of the suspension.

The State admitted, during the SCDPS administrative hearing, "[b]oth parties, the State and the accused, are entitled to a full hearing as to the introduction of evidence." (Emphasis added). The State concedes the value of a test refusal hearing and its inherent importance in the judicial process. Under S.C. Code Ann. § 56-5-2950(e), "the State ha[d] the burden of proof [to demonstrate Petitioner's DUI] . . . ." The State sought to introduce evidence of Petitioner Bacote's test refusal to demonstrate he "knew" he was intoxicated at the time he was driving. The State could then argue Petitioner Bacote refused the test, notwithstanding the suspension, to deny the officer evidence for use in a later DUI prosecution - regardless of the SCDPS's decision.

Just as important, even though a suspension hearing may not have been designed as a pre-trial evidentiary hearing, such hearings oftentimes afford a defendant his principle

opportunity to discover evidence from the State. This is especially true in a DUI - First Offense case, since there is no preliminary hearing for such a charge.

Notwithstanding, the sometimes limited nature of administrative hearings like the Employment Security Commission proceedings in Shelton v. Oscar Meyer Foods Corp., 325 S.C. 248, 481 S.E.2d 706 (1997); test refusal hearings are more than simple administrative procedures limited to the appropriateness of the ninety-day suspension. These hearings are very important since the arresting officer and the test operator must testify, under oath, to demonstrate the DUI arrest was proper and the test procedures were followed.

Moreover, unlike an ESC hearing where "the matter in controversy is . . . small [and the parties] are generally likely to be unrepresented by counsel," Shelton, 319 S.C. 81, 89, 459 S.E.2d 851, 855, a refusal hearing has many issues in controversy and the defendant is most likely will, in fact, be represented by counsel. For example, the relative certainty of substantially higher insurance rates[3] and/or not being able to operate a motor vehicle constitutes a substantial hardship justifying retaining legal counsel to challenge the

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[3]In order to operate a motor vehicle after a DUI conviction, the convicted driver must obtain special insurance, commonly referred to as SR-22. Current estimates of SR-22 insurance rates often exceed $3,200.00 per year for the required three years.

administrative suspension.

Additionally, there is no guarantee the SCDPS will schedule or conduct the administrative hearing in an expedient manner. For example, Petitioner Bacote's hearing occurred more than five months after his arrest and the hearing officer rendered the decision two months later.[4] Moreover, operators subject to an administrative suspension do not have any incentive to have a "speedy" hearing, since when a refusal hearing is requested, the drivers' license suspension does not even begin unless and until after the suspension is affirmed. S.C. Code Ann. § 56-5-2950(d). Petitioner Bacote, therefore, does not have any pressing need to have the matter proceed expeditiously. Therefore, unlike the unemployment benefits situation in Shelton where funds may be necessary for food and shelter, there are no exigent circumstances present in a administrative refusal hearing.

Finally, the reason the suspension has been overturned does not provide any reason to deny a defendant the benefit of a reversal. For example, in Village of Westfield v. Mashek, 189 Wis.2d 491, 527 N.W.2d 399 (Ct.App. 1994) (1994 Wisc.App. LEXIS 1392); the State, as in this case, failed to appear at the judicial review and the administrative suspension was vacated. Mashek, 1994 Wisc.App. LEXIS

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[4]Contrast such a situation with an unemployed worker seeking unemployment benefits and having to wait more than five months for a hearing and then two additional months for a decision. See Shelton, 319 S.C. 81, 459 S.E.2d 851.

1392 *3. Mr. Mashek unsuccessfully moved to suppress any evidence of probable cause, Mashek, 1994 Wisc.App. LEXIS 1392 *3-4; but was tried and convicted. Mashek, 1994 Wisc.App. LEXIS 1392 *3-4. On appeal the Wisconsin Court of Appeals reversed the trial court holding

> The [State] knew or should have known . . . the issue of probable cause to arrest was to be reviewed at the judicial review, and no valid reason was given [to the court] why the [State] failed to appear. . . . Thus, the [State] has only itself to blame for not appearing at the judicial review. This is not a circumstance in which the application of the doctrine of collateral estoppel is inappropriate.

Mashek, 1994 Wisc.App. LEXIS 1392 *6-7 (citing Heggy v. Gardner, 156 Wis.2d 186, 193-194, 456 N.W.2d 845, 849 (Ct.App. 1990)) (Emphasis added). See also Todd v. State, ___ S.W.2d ___ (Tex.App. 1997) (1997 Tex.App. LEXIS 5980); Aguilar v. State, 947 S.W.2d 257, 259 (Tex.Crim.App 1997)). Consequently, the State's failure to appear to defend the suspension, regardless of the reason, cannot defeat the effect of collateral estoppel in the subsequent criminal action.

A test refusal hearing is designed to be a contested evidentiary matter during which important issues of probable cause and sobriety are addressed. A decision, adverse to the State, must be allowed to collaterally estop the State from

using a tainted BA refusal against a defendant in a criminal prosection.

IV. CONCLUSION

Based on the foregoing arguments and citation of authority, the Petitioner, Robert L. Bacote, respectfully requests this Supreme Court to grant his Petition for Writ of Certiorari.

Respectfully submitted:

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